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Stiletto Television, Inc.

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Stiletto Television, Inc., a
California corporation,

plaintiff,

v.

Hastings, Clayton &
Tucker, Incorporated, a
Nevada corporation, dba
Stiletto Entertainment; and
Does 1-25, inclusive,
defendants.

Case No. 2:18-cv-3911-DSF-
PLA
Hon. Dale S. Fischer

Stiletto Television, Inc.'s
Memorandum of Points and
Authorities in Opposition to
Hastings, Clayton & Tucker,
Inc.'s Motion for Summary
Judgment

[Declarations of Maxim Price
and Troy P. Queen in support
hereof; and Statement of
Genuine Issues of Material Fact
in Opposition to Hastings,
Clayton & Tucker, Inc.'s Motion
for Summary Judgment filed
concurrently herewith]

TABLE OF CONTENTS

I.	Introduction	1
II.	Background.....	3
	A. The Formation of Stiletto Television, Inc.....	3
	B. The Creation of <i>Barry Manilow: Music and Passion</i>	3
	1. STV approaches Barry Manilow to star in its first creative program.....	3
	2. STV retains producer Paul Morphos and director David Mallet to shoot Music and Passion.....	4
	3. STV contracts PBS to televise Music and Passion.....	5
	4. STV Contributes to the Creation of Music and Passion.....	5
	C. STV's Contributions To Music And Passion Are Recognized.....	6
	1. STV receives recognition for its contribution to Music and Passion.....	6
	D. STV Creates <i>Barry Manilow: Songs From the Seventies</i>	7
	E. Course of Conduct After the Creation of <i>Songs From the Seventies</i>	9
III.	Argument.....	10
	A. HCT's Argument is Premised on a Legal Fiction.....	10
	1. HCT's Provides no Objectively Verifiable Evidence.....	10
	2. STV Owns the Copyrights to the Works.....	11

1	a.	Manilow and HCT do not have a copyright	
2		claims in the works because STV repudiated	
3		any copyright more than a decade ago	12
4	b.	The recent assignments by Morphos, Mallet,	
5		and Manilow to HCT are not valid.....	15
6	3.	In the Alternative, STV is an “author” of each of	
7		the films.....	16
8	a.	STV’s Contributions Would Also Qualify as a	
9		Joint Author.....	17
10	b.	STV owns the copyrights that would have	
11		otherwise vested in Mallet and PJM.....	19
12	IV.	Conclusion.....	20

Table of Authorities

Cases Pages

<u>Zuill v. Shanahan,</u>	
80 F.3d 1366, (9th Cir.(Cal.) 1996).....	12
<u>Aalmuhammed v. Lee,</u>	
202 F.3d 1227, (9th Cir.(Cal.) 2000).....	12, 17
<u>Seven Arts Filmed Entertainment Ltd. v.</u>	
<u>Content Media Corp. PLC,</u>	
733 F.3d 1251, (9th Cir.(Cal.) 2013).....	12
<u>Silva v. Sunich,</u>	
WL 6116645 (C.D.Cal. Sep. 06, 2006).....	13
<u>Ritchie v. Williams,</u>	
395 F.3d 283 (6th Cir.(Mich.) 2005).....	13
<u>Morrill v. Smashing Pumpkins,</u>	
57 F.Supp. 2d 1120, (C.D.Cal. 2001).....	17
<u>Community for Creative Non-Violence v. Reid,</u>	
490 U.S.730, 109 S. Ct. 2166, (U.S.Dist.Col. 1989).....	20

Statutes and Regulations

17 U.S. C. § 507(b).....	2, 11
17 U.S.C. § 101.....	16

Rules

Fed. R. Civ. P. 26(a).....	2
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1 Plaintiff Stiletto Television, Inc. (“Plaintiff” or “STV”) respectfully
 2 submits this opposition to the Motion for Summary Judgment filed by
 3 defendant Hastings, Clayton & Tucker, Inc. (“Defendant” or “HCT”)¹.

4 **I. Introduction**

5 This is a civil action for declaratory relief arising out of a dispute
 6 over U.S. copyrights in two films created by Plaintiff, *Barry Manilow:*
 7 *Music and Passion Live from Las Vegas* (“*Music and Passion*”) and
 8 *Barry Manilow: Songs from the Seventies* (“*Songs from the Seventies*”)
 9 (together, the “Films”). (See generally Dkt. No. 1). Defendant filed its
 10 Motion for Summary Judgment (the “Motion”) requesting that this
 11 Court find as a matter of law that it is the exclusive owner of the
 12 copyright in the aforementioned Films, while simultaneously
 13 invalidating Plaintiff’s lawful copyright registration in the Films. For
 14 the reasons explained in this memorandum and on the strength of the
 15 evidence adduced in discovery, Defendant has not established any basis
 16 for summary judgment because there exist triable issues of fact as to
 17 whether STV owns the copyright. As such, its motion should be denied.²

18 Defendant’s Motion is based entirely on serial misstatements of
 19 both facts and law. Defendant’s Motion relies singly on an
 20 unsupportable legal fiction: that this case is between Barry Manilow
 21

22 ¹ In Defendant’s opening brief, Defendant HCT is referred to by an
 23 abbreviation of its d.b.a. Stiletto Entertainment (“Stiletto”). Because
 24 this can create confusion as between Stiletto Television and Stiletto
 Entertainment, Plaintiff refers to Defendant as “HCT” or “Defendant.”

25 ² Defendant filed its motion for summary judgment on the last possible
 26 day to do so and refused to even discuss a motion for an extended
 27 briefing schedule despite leaving Plaintiff with under a week to
 28 oppose. Plaintiff may request additional briefing if relevant discovery
 is adduced during the remaining two depositions ordered by the Court
 of Garry and Rob Kief. Declaration of Maxim Price ¶ 2.

1 and the individuals Mark Grove and Troy Queen rather than between
 2 the companies HCT (a management company that has Barry Manilow
 3 as one of its clients) and STV (comprised of Garry Kief, Mark Grove,
 4 and Troy Queen). Motion at 1 line 14. Furthermore, documentary
 5 evidence and witness testimony show that Garry Kief, Barry Manilow,
 6 and HCT agreed that STV was the exclusive owner of the copyrights in
 7 both of the Films. Copyright ownership accrues only once – when a
 8 work is created. Both of the Films were created over twelve years ago.
 9 Yet even though HCT and Barry Manilow, both in close relationship
 10 with STV, knew from inception that STV claimed and openly used
 11 exclusive ownership of the Films, thereby expressly repudiating any of
 12 their ownership claims, neither took any action within the three-year
 13 statute of limitations. Thus, a reasonable finder of fact could determine
 14 that HCT's claim that STV is not the sole copyright owner of the Films
 15 is barred under 17 U.S. C. § 507(b). Neither Defendant's revisionist
 16 history nor its creation of new, litigation-driven documents a few
 17 months ago saves it from this result under the weight of the evidence
 18 provided by Plaintiff.³

19 Even if HCT's claim in defense of this action were not barred by
 20 the statute of limitations, sufficient evidence exists such that a
 21 reasonable finder of fact could find for STV on other grounds discussed
 22 below and, among other relief, invalidate HCT's 2016 copyright
 23 registration.

24
 25
 26 ³ Despite agreeing to do so by April 3, 2019, HCT has not produced any
 27 documents to date neither in response to STV's requests for production
 28 nor in compliance with initial disclosures under Federal Rule of Civil
 Procedure 26(a). Declaration of Maxim Price ¶ 3.

1 **II. Background**

2 **A. The Formation of Stiletto Television, Inc.**

3 In late 2003, Troy Queen (“Queen”) reconnected with long-time
4 fraternity acquaintance Garry Kief. STV’s Statement of Genuine Issues
5 of Material Fact in Opposition to HCT’s Motion for Summary Judgment
6 (“SGIMF”) ¶ 157. A short time later, Queen and his partner Mark Grove
7 (“Grove”)—who had been producing television news for NBC at the time
8 —were invited to Palm Springs, California to meet with Garry Kief
9 (“Kief”) and Barry Manilow (“Manilow”) to discuss forming a motion
10 picture production company. SGIMF, ¶ 159. Following a productive
11 meeting Queen, Grove, and Kief formed STV. SGIMF, ¶ 160. Each of
12 the three founders was a one-third shareholder in the company, which
13 remains true today. *Id.* Grove would focus more on the company’s
14 creative programming, while Queen and Kief would focus primarily on
15 the company’s financials. Grove was responsible for creative, Queen for
16 logistics, and Kief was responsible for maintaining the corporate books
17 of STV through the accounting portion of his company, Defendant HCT
18 and made financial investments in STV. SGIMF, ¶ 161.

19 **B. The Creation of *Barry Manilow: Music and Passion***

20 **1. STV approaches Barry Manilow to star in its first** 21 **creative program**

22 In conjunction with the initial formation of STV, Grove, Queen
23 and Kief discussed potential opportunities to kick-start the business.
24 SGIMF, ¶ 162. The trio, along with Barry Manilow, decided that STV’s
25 first major project would feature Barry Manilow marking his longtime
26 return to television. *Id.* Barry Manilow later obtained a concert
27 residency at the Las Vegas Hilton, which turned out to be the perfect
28

1 opportunity for STV to move forward with its plan. SGIMF, ¶ 163.

2 **2. STV retains producer Paul Morphos and director David**
 3 **Mallet to shoot *Music and Passion***

4 Mr. Queen of STV and Mr. Sharell of HCT reached out to veteran
 5 producer Paul Morphos (“Morphos”), Mr. Morphos’s production
 6 company “PJM” and director David Mallet to pitch the idea and have
 7 them come see the show. SGIMF, ¶ 22-25. On November 30, 2005,
 8 STV and PJM entered into a deal memorandum with respect to the
 9 production of *Music and Passion*. SGIMF, ¶ 164. The deal
 10 memorandum set out the initial terms of the engagement between STV
 11 and PJM. Under the expressed terms of the memorandum PJM
 12 guaranteed to produce *Music and Passion* while STV retained all
 13 ownership in the production. *Id.* This was done with the knowledge
 14 and participation of HCT employees. SGIMF, ¶ 164.

15 In keeping with the deal memo, on or around January 12, 2006,
 16 STV wrote to PJM to confirm the detailed deal points of their production
 17 agreement for *Music and Passion*. SGIMF, ¶ 165. As part of the
 18 agreement, Kief, Grove, and Queen would be Executive Producers and
 19 members of the project’s creative team. (*See* Exhibit 8 to Morphos
 20 deposition, clause 1.1.10). Further, as part of the agreement PJM
 21 assigned “irrevocably and exclusively... all right title and interest in
 22 and to the programs...” and undertook to get the same assignment from
 23 everyone he hired, including David Mallet. SGIMF, ¶ 166-167. Under
 24 the production agreement’s assignment, PJM also agreed that *Music*
 25 *and Passion* was a program commissioned by STV and constituted a
 26 work made for hire within the meaning of the United States Copyright
 27 Act. *See id.* Garry Kief, who is also principal of defendant HCT, knew
 28

1 of the existence of this agreement and even helped enforce its terms as
2 against Damon Whiteside without any objection. SGIMF, ¶ 169.

3 **3. STV contracts PBS to televise *Music and Passion***

4 Upon recommendation from Morphos, and with help from their
5 agents at the William Morris Agency (“WMA”), Grove and Queen
6 reached out to the Public Broadcasting Service (“PBS”) to gauge the
7 television network’s interest in sponsoring *Music and Passion*. From
8 October 2005 to December 2005, STV negotiated a purchasing and
9 licensing agreement with PBS for a television program featuring *Music*
10 *and Passion*. SGIMF, ¶ 170. An agreement between STV and PBS was
11 ultimately finalized in December 2005. *Id.* As part of the final
12 agreement between PBS and STV, PBS committed \$200,000 to the
13 project, which monies were deposited into STV’s bank account. SGIMF,
14 ¶ 171. This too was done openly and with the express approval of Garry
15 Kief. *Id.* Importantly, STV would also retain all copyrights in *Music*
16 *and Passion* as part of the agreement with PBS. SGIMF, ¶ 170, (Jones
17 Dep. Ex. 3 ¶ 2). The PBS agreement was reviewed by all three STV
18 members, including Kief. SIGMF, ¶ 171.

19 **4. STV Contributes to the Creation of *Music and Passion***

20 Queen and Grove of STV were significantly involved throughout
21 the pre-production, production, and post-production of *Music and*
22 *Passion*. SIGMF, ¶ 172. As he owed a fiduciary duty to STV, Garry
23 Kief contributed work and funds on behalf of STV as well. *Id.* As the
24 installation of the show began at the Las Vegas Hilton, Grove moved
25 from Los Angeles to Las Vegas. SGIMF, ¶ 173. Grove brought with him
26 a camera kit, light kit, and an audio kit and documented the making of
27 *Music and Passion*. *Id.* Grove used this equipment to film Mr. Manilow
28

1 and his backup singers and band doing rehearsals in the theater before
 2 it was open to the public, and captured significant behind the scenes
 3 footage documenting how the entire show came together into a film. *Id.*
 4 The film shot by Grove was ultimately used in the PBS television special
 5 and DVD. *Id.* No one else was involved in that filming, Mr. Grove did
 6 it alone. Additionally, Grove participated in the lighting work for the
 7 concert and worked extensively in the production of the concert shoot.
 8 SGIMF, ¶ 39, 40. Following the completion of the shoot, Grove was
 9 involved in the editing of the film at the editorial vendor Matchframe
 10 studios, providing his own notes on the film's audio and picture.
 11 SGIMF, ¶ 49

12 Queen was also significantly involved in the production of *Music*
 13 *and Passion*. Queen was in charge of the logistics of producing the DVD
 14 and PBS-specific filming and for the various DVD versions and regions.
 15 SGIMF, ¶ 174. He worked with Morphos and Tom Davis on the camera
 16 plots, budgeting, credits, seating, travel and setlist for the show. *Id.*
 17 Furthermore, PJM provided proposed budgets for Queens approval. *Id.*
 18 Whenever there was a change to the budget, or a last-minute
 19 requirement that required additional money, Queen would be the one
 20 to sign off on that change and coordinate the change. *Id.* For instance,
 21 when an additional camera operator was needed, Queen approved and
 22 organized it. *Id.*

23 C. STV's Contributions to *Music and Passion* are 24 Recognized

25 1. STV receives recognition for its contribution to *Music and* 26 *Passion*

27 In recognition of its contributions to *Music and Passion*, STV was
 28

1 included on the program's DVD packaging and in the program's ending
2 credits. SGIMF, ¶ 175. Of note, Kief, Grove, and Queen were listed as
3 the executive producers in the very first single frame that rolls at the
4 film's ending credits. SIGMF, ¶ 61. Both the aforementioned DVD
5 packaging and credits were reviewed and approved by both Kief and
6 Manilow. SGIMF, ¶ 175.

7 *Music and Passion* was very well-received by the entertainment
8 industry, Manilow's fans, and by the public in general. Following *Music*
9 *and Passion's* release, STV initiated a multifaceted Emmy Awards
10 campaign. SGIMF, ¶ 176. Additionally, during the Emmy campaign
11 STV hired the Lippin Group, a renowned international corporate
12 communications and publicity company. STV worked closely with the
13 Lippin Group to create and publish advertisements for *Music and*
14 *Passion* in papers, magazines, and other media. All of the
15 advertisements and press releases identified *Music and Passion* as "a
16 Stiletto television production." SGIMF, ¶ 177. Additionally, all designs
17 of the press releases and Emmy submissions were approved by Barry
18 Manilow. *Id.* STV's efforts were ultimately successful as *Music and*
19 *Passion* earned two Emmy nominations, with Manilow receiving a 2006
20 Emmy. SGIMF, ¶ 176. During his acceptance speech, Manilow thanked
21 STV and both Grove and Queen by name. SGIMF, ¶ 178. The DVD of
22 *Music and Passion* went triple platinum. SGIMF, ¶ 179.

23 STV openly entered into and solely benefited from an exclusive
24 license agreement with Rhino in 2006 for the manufacturing and
25 distribution of *Music and Passion*. HCT knew about it, received the
26 royalty statements, deposited the royalties in STV's bank accounts and
27 never once objected in all of these years. SGIMF ¶ 79.

1 **D.STV Creates *Barry Manilow: Songs From the Seventies***

2 After the tremendous success of *Music and Passion*, STV began
3 thinking about and working on the next Barry Manilow special as early
4 as November of 2006. SGIMF ¶ 90. *Songs from the Seventies* was not
5 based on a pre-existing show, rather, “the concert was created for
6 television.” SGIMF, ¶ 91.

7 STV reunited the team that worked on *Music and Passion*, which
8 included hiring director Mallet and Morphos of PJM; But this time STV
9 hired each individual worker including Mallet and Morphos directly.
10 SGIMF, ¶¶ 92 and 93. In the summer of 2007, Queen, on behalf of STV,
11 negotiated another deal with PBS whereby PBS would pay a fee of
12 \$200,000 to STV and STV would retain the copyright in *Songs from the*
13 *Seventies*. SGIMF, ¶ 124. The terms of the deal were reviewed by
14 STV’s agents at WMA and Garry Kief. *Id.* The deal letter with PBS
15 lists STV as the copyright holder. *Id.* Queen also negotiated the
16 agreement with Steiner studios, the sound stage provider where the
17 production was filmed. SGIMF, ¶ 96. In August 2007, Queen also
18 entered into an amendment to the distribution agreement with Rhino
19 to add *Songs from the Seventies* to the products distributed by Rhino.
20 SGIMF, ¶ 181.

21 Queen and Grove were instrumental to the creation of *Songs from*
22 *the Seventies*. In addition to pitching the project, negotiating the
23 agreement with PBS, hiring the production crew and the director, and
24 securing the location of the shoot, both Queen and Grove were involved
25 in the conception of the project at the pre-production stage and
26 coordinated the logistics of the show. SGIMF, ¶¶ 90, 93, 96, 99, 100,
27 103, 104. They were constantly present during preparations and filming
28

1 and were involved in the financial and business aspect of the production
 2 as well. SGIMF, ¶ 100. During post-production, they provided feedback
 3 and oversaw important aspects of editing. SGIMF, ¶ 106.

4 Moreover, STV funded the development and production of *Songs*
 5 *from the Seventies*. Kief, a principal of STV who controlled its finances,
 6 provided funds for the film through STV and had his staff book those
 7 payments in STV's QuickBooks. SGIMF, ¶ 94. The profit and loss
 8 account for STV breaks down the monies provided by STV for *Songs*
 9 *from the Seventies*. *Id.* For example, STV paid director Mallet's fee of
 10 \$47,527 on October 9, 2007, PJM's producer fees of \$32,500 on
 11 September 24, 2007, and a total studio rental cost of \$77,808.14 to
 12 Steiner Studios in the fall of 2007. *Id.* (See e.g. STV_CDCAL_0008492-
 13 93, at 27, 30, 31). After the show was completed, Queen and Grove
 14 spearheaded the marketing and Emmy campaign that resulted in the
 15 DVD going platinum, receiving an Emmy nomination, and being
 16 broadcast on more television stations than *Music and Passion*. SGIMF,
 17 ¶ 182.

18 **E. Course of Conduct After the Creation of *Songs From the*** 19 ***Seventies***

20 STV consistently asserted its copyright in *Songs from the*
 21 *Seventies* and both Manilow and Kief acquiesced in those
 22 representations. The packaging of the DVD for *Songs from the*
 23 *Seventies* clearly identifies the film as a "Stiletto Television production."
 24 SGIMF, ¶ 184. STV conspicuously asserted and commercially exploited
 25 the exclusive copyrights in *Songs from the Seventies* with the full
 26 knowledge of and without any objection from HCT or Barry Manilow.
 27 SGIMF, ¶ 184. Moreover, and as noted above, Manilow directly
 28

1 approved all documents and external communications bearing his name
2 or image. *Id.*

3 **III. Argument**

4 **A. HCT's Argument is Premised on a Legal Fiction**

5 HCT begins its Motion by attempting, without any legal authority
6 or basis, to change the parties to this lawsuit. HCT proclaims on the
7 first page of its motion that “[t]o be clear, this case is a copyright battle
8 between two former Manilow assistants, Troy Queen and Mark Grove,
9 on the one hand, and Barry Manilow, on the other.” This is blatantly
10 false. The Plaintiff here is STV, which includes as its owners and
11 employees, for the time period relevant to this dispute, Troy Queen,
12 Mark Grove, Garry Kief, and other employees including Jonathan
13 Parkman, and Matthew Schwartz. Garry Kief’s contributions to STV
14 are not negated merely because, as HCT appears to argue, he was
15 involuntarily removed from the board of directors nearly a decade after
16 the events relevant to this lawsuit took place.⁴

17 Moreover, Barry Manilow is not a party. HCT supports this game
18 of 3-card-monty by stating that HCT is Mr. Manilow’s “business arm.”
19 First, there is no such mechanism that would permit one party to stand
20 in for another. And even if there was, Mr. Manilow has several other
21 corporations through which he runs his business, including BMPI, Inc.
22 and Obbligato. SGIMF, ¶ 13. This lawsuit is about HCT and its
23 improper use of copyrights that belong to STV.

24 Without evidence or legal support for these changes in legal
25 structure, HCT cannot support its Motion.

26 ⁴ STV will not burden the Court with a rebuttal to Defendant’s false
27 claims regarding why Mr. Kief was involuntarily removed from STV’s
28 board in 2014 because it is irrelevant to this action.

1 **1. HCT's Provides no Objectively Verifiable Evidence**

2 HCT's Motion relies on a statement of purportedly uncontroverted
3 facts that are mere opinions of biased witnesses. One of HCT's main
4 arguments is that STV does not hold any copyright interest in *Music*
5 *and Passion* because it completed *no* work at all to create the work. To
6 support this, HCT provides the testimony of Mssrs. Mallet, Morphos,
7 and Ciancimino—individuals who have either a business relationship
8 or a personal relationship, or both, with Mr. Manilow. SGIMF, ¶ 61. To
9 make matters worse, HCT relies on copyright assignments that it
10 obtained from Messrs Morphos and Mallet mere weeks before their
11 depositions in this matter. SGIMF, ¶ 52. The remainder of HCT's
12 statement of uncontroverted facts largely comprises cites to Mr.
13 Manilow or Mr. Kief's declarations. The credibility of HCT's principal,
14 his husband and their potential business partners is squarely within
15 the purview of a finder of fact.

16 **2. STV Owns the Copyrights to the Works**

17 There is ample evidence that since the creation of each of the
18 Films, STV has held itself out as the exclusive owner of the copyrights
19 as demonstrated below. There is also no dispute that STV and HCT
20 were in close relationship, and that despite knowing of and
21 participating in STV's assertion that it was the sole copyright owner,
22 HCT did nothing to contest STV's ownership or to assert its own claim
23 for copyright ownership within the three year period following each of
24 the Film's creation. Accordingly, notwithstanding the genuine issues of
25 fact surrounding the creation of each of the Films as detailed above, the
26 Motion, HCT's or Barry Manilow's attempt to assert that they are the
27 copyright owner of the Films is barred by the Copyright Act's statute of
28

1 limitations. 17 U.S.C. § 507(b).

2 a. Manilow and HCT do not have a copyright claims in
3 the works because STV repudiated any copyright
4 more than a decade ago

5 Courts have concluded that claims for co-ownership accrue only
6 once, “when plain and express repudiation of co-ownership is
7 communicated to the [alleged co-owner], and are barred three years
8 from the time of repudiation.” *Zuill v. Shanahan*, 80 F.3d 1366, 1369
9 (9th Cir. 1996); see also *Aalmuhammed v. Lee*, 202 F.3d 1227, 1230-31
10 (9th Cir. 2000) (Where “creation rather than infringement is the
11 gravamen of an authorship claim, the claim accrues on account of
12 creation, not subsequent infringement, and is barred three years from
13 ‘plain and express repudiation’ of authorship.”) While *Zuill* and
14 *Aalmuhammed* both involved claims of co-ownership, the Ninth Circuit
15 has extended this rule to also include claims of sole ownership. *Seven*
16 *Arts Filmed Entm’t, Ltd. v. Content Media Corp. PLC*, 733 F.3d 1251,
17 1258 (9th Cir. 2013) (untimely claim will bar a claim for copyright
18 ownership when the parties are in a close relationship).

19 HCT and Manilow are barred from raising objections now. By
20 HCT’s own admission, STV is the only entity that has ever collected
21 royalties from the commercial exploitation of the films. STV did not pay
22 Manilow or HCT any portion of the royalties it received. SGIMF, ¶¶ 79,
23 126. Manilow and HCT have never raised an objection or demanded to
24 be paid royalties. This case is quite unique in that the party now
25 complaining that this repudiation was unfair had every opportunity to
26 act on the repudiation within the statutory time period. STV’s
27 repudiation was done in full open view of Garry Kief, HCT, and Barry
28

1 Manilow. Garry Kief, who is the sole shareholder of HCT, Barry
2 Manilow's self-proclaimed "business arm" and his husband, reviewed
3 the contracts, received the statements from licensees outlining royalty
4 payments due, and booked the royalty revenues in STV's accounting
5 software ("QuickBooks"), and deposited the monies in STV's account.
6 *Id.* HCT, Garry Kief, and Barry Manilow are barred from raising
7 objections three years after the 2006 repudiation for *Music and Passion*
8 and 2007 repudiation for *Songs from the Seventies* effected by STV.
9 *Seven Arts*, 733 F.3d at 1257 (Seven Arts knew of Paramount's interest
10 in, and distribution of, the pictures during the statutory period, and
11 knew that Paramount was not paying royalties to Seven Art's
12 predecessors); *Silva v. Sunich*, No. CV 03-9327 GPS (CWX), 2006 WL
13 6116645, at *6 (C.D. Cal. Sept. 6, 2006) (finding that failure to pay
14 royalties constituted repudiation of co-ownership and commenced the
15 statute of limitations period.)

16 Furthermore, STV consistently represented, with HCT's and
17 Manilow's knowledge and acquiescence, that it was the sole copyright
18 owner of each of the films. *See Zuill*, 80 F.3d at 1368 (finding plain and
19 express repudiation where defendants sent to plaintiffs an agreement
20 providing that defendant was the sole author of the works); *Ritchie v.*
21 *Williams*, 395 F.3d 283, 288 (6th Cir. 2005) (finding plain and express
22 repudiation where plaintiff had expressly told the defendants, in a
23 letter, that plaintiff had exclusive ownership of the composition he had
24 written).

25 For each film, STV entered into a number of agreements that
26 called for STV to retain exclusive ownership of the copyright, and Garry
27 Kief and employees of HCT reviewed and approved these agreements.
28

1 For example:

2 1. STV and PBS entered into an agreement by which STV
3 retained all copyrights in *Music and Passion*. (SGIMF, ¶
4 170, (Jones Dep. Ex. 3 ¶ 2)). The PBS agreement was
5 reviewed by all three STV members, including Kief. SGIMF,
6 ¶ 124.

7 2. Kenny Pyle, an employee of Stiletto Entertainment,
8 worked on the agreement between STV and DVD
9 distribution company 3DD that gave 3DD exclusive
10 international rights over *Music and Passion*. *Id.*

11 3. STV and PBS entered into an agreement by which STV
12 retained all copyrights in *Songs from the Seventies*. *Id.* The
13 terms of the deal were reviewed by STV's agents at WMA
14 and by Garry Kief. *Id.* The deal letter with PBS lists STV as
15 the copyright holder. *Id.*

16 4. The agreement between STV and Steiner studios,
17 where *Songs from the Seventies* was filmed, assigns all
18 intellectual property rights to STV. SGIMF, ¶ 96. Tucker
19 Cheadle and Tom Ugland, HCT's attorneys, reviewed the
20 agreement. *Id.*

21 5. The Copyright Statement between STV and Sony
22 DADC US Inc. states that STV is the copyright holder for
23 *Songs from the Seventies*. SGIMF, ¶ 184.

24 6. Kenny Pyle, along with attorney, drafted an
25 agreement between STV and Manilow's musicians by which
26
27
28

1 the musicians assigned their rights to STV.⁵ SGIMF, ¶ 109.
 2 Pyle sent the draft agreement to Queen and Kief for their
 3 review. *Id.* At his deposition, Pyle testified that “it would
 4 have been a big no-no” to make any decisions related to
 5 contracts without consulting Kief. *Id.*

6 Moreover, the packaging for the DVDs clearly show that STV
 7 claims exclusive copyright ownership of the film, and STV received top
 8 billing in the credits for each of the productions. SGIMF, ¶ 61, 97. Two
 9 HCT employees worked with Grove and Queen on the back-cover art for
 10 *Songs from the Seventies*, which lists STV as the sole copyright holder.
 11 SGIMF, ¶ 125. Rob Kief, brother of Garry Kief and Executive Vice
 12 President of Stiletto Entertainment, worked on the credits for *Songs*
 13 *from the Seventies*, which include the mention of Stiletto Television as
 14 the sole copyright holder. *Id.*

15 Defendant cannot now claim, more than a decade after STV’s clear
 16 and express repudiation, that HCT and Manilow have an ownership in
 17 the copyrights of the films. These defenses are time-barred—and have
 18 been for years.

19 b. The recent assignments by Morphos, Mallet, and
 20 Manilow to HCT are not valid

21 HCT fails to mention in its Motion that the written agreements
 22 signed by Manilow, Mallet, and Morphos that allegedly assign their
 23 copyright to Defendant are dated February 1, 2019. These assignments
 24 cannot be valid for several reasons.

25 _____
 26 ⁵ While the draft agreement does not specify which recordings are
 27 covered by the agreement, the date of the emails and the forward-
 28 looking discussion suggest that the agreement was drafted in
 preparation for *Songs from the Seventies*.

1 *First*, and as explained above, these individuals did not, as of
 2 February 2019, own a valid copyright in *Music and Passion* and *Songs*
 3 *from the Seventies*. Any claims to copyright ownership, to the extent
 4 they ever existed, were assigned to STV or have been time-barred for
 5 years. Manilow, Morphos, and Mallet cannot assign a copyright they
 6 do not own.

7 *Second*, even if they did at some point own copyrights to the films,
 8 Morphos, on behalf of PJM, and Mallet had previously assigned them
 9 to STV.

10 *Third*, Mallet and Morphos did not understand what they were
 11 signing and the agreements were obtained by fraud. Mallet testified
 12 that he understood at the time he was working on *Songs from the*
 13 *Seventies* that he would not be retaining his copyright in the work and
 14 that he was assigning the works to someone else, though he doesn't
 15 know or care to whom that assignment was made. SGIMF, ¶ 92 (Mallet
 16 Dep. 79:6-11). Morphos testified that he knows "virtually nothing"
 17 about copyright law and believed that he signed a renewal of the
 18 assignment that he had previously signed. SGIMF, ¶ 107.

19 **3. In the Alternative, STV is an "author" of each of the** 20 **films**

21 For a work to be characterized as a joint work, (1) there must be a
 22 copyrightable work, (2) two or more authors, and (3) the authors must
 23 intend their contributions to be merged into inseparable or
 24 interdependent parts of a unitary whole. 17 U.S.C. § 101 (1976). Courts
 25 have looked at the following criteria to determine whether a contributor
 26 is an author: (1) whether the purported author controls the work and
 27 is the inventive or master mind who creates or gives effect to the idea,
 28

(2) whether the putative coauthors make objective manifestations of shared intent to be coauthors, and (3) whether the audience appeal of the work turns on both contributions and the share of each in its success cannot be appraised. *Aalmuhammed v. Lee*, 202 F.3d 1227, 1234 (9th Cir. 1999). In “[t]he case of a music video is equally clear: absent a written agreement, the copyright for the music video is a joint ownership between the performing artists and the video's producer (assuming an original contribution by the producer or an employee of the producer).” *Morrill v. Smashing Pumpkins*, 157 F. Supp. 2d 1120, 1126 (C.D. Cal. 2001).

a. STV’s Contributions Would Also Qualify as a Joint Author

If no repudiation has occurred, the contributions of STV throughout the entire pre-production, production, and post-production processes of both *Music and Passion* and *Songs from the Seventies* clearly establish it as a joint author.

For example, Grove personally filmed a variety of content, with his own hands holding a camera, that ultimately comprised the “making-of” portion of the second DVD in the *Music and Passion* two-DVD set, and was used in the PBS television broadcast. This footage includes, the scenes created by Mr. Grove depicting the making of the *Music and Passion* film, shots of Manilow and his backup singers and band doing rehearsals in the theater before it was open to the public, interviews with the cast and crew working on the show, as well as hours of behind the scenes footage documenting how the entire show came together, all invented and brought to life by Mr. Grove.

During the production and filming of *Music and Passion*, Queen

1 and Grove provided input on camera plots, lighting choices, timing and
2 arrangement of the various segments, the arrangement of the various
3 chapters of the show, and the PBS pledge breaks. It was during these
4 pledge breaks that Queen and Grove would often assist in drafting
5 questions and answers for interview with Manilow.

6 During the post production of the show, Grove and Queen were
7 also involved in the audio mixing and syncing, organizing audience
8 shots and color correction for *Music and Passion*. Mr. Grove testified
9 that he spent countless hours and many a sleepless night in the editing
10 room. This work was done for every version of the show including the
11 PBS broadcast version, the U.S. DVD version, and the International
12 DVD regional versions. For both versions of the DVDs, Grove and
13 Queen were also intimately involved in designing the DVD packaging
14 and the DVD menus. This work included the designing the overlapping
15 dual DVDs layout, the DVD jacket, and the booklets included with each
16 DVD. These designs were distinct among all other Manilow DVDs.

17 Moreover, STV paid for all costs and expenses for *Songs from the*
18 *Seventies*, and STV directly hired and controlled the individuals,
19 including Mallet and Morphos, who worked on the production. SGIMF,
20 ¶ 94. All of the contributions by STV, including Grove and Queen were
21 invaluable to the overall quality and uniqueness of the Film and
22 ultimately led to the programs' Emmy Award winning success.

23 There is something unique about what Mark Grove and Troy
24 Queen bring to the table. STV has had wild success in creating
25 television programming (SGIMF, ¶ 185) and the two Films at issue here
26 stand out from all of the other Manilow films in their wide appeal and
27 success (SGIMF, ¶ 176, 178, 179, 183). A jury may very well find that
28

1 it was STV employees that caught the lightning in a bottle that made
2 *Music and Passion* and *Songs from the Seventies* special.

3 b. STV owns the copyrights that would have otherwise
4 vested in Mallet and PJM

5 Even assuming, *arguendo*, that the copyright ownership of each of
6 the works vested only in Manilow and Mallet⁶ under a theory of joint
7 authorship, summary judgment cannot be granted in favor of HCT
8 because Mallet assigned his copyright in the films to STV.

9 Mallet and Serpent were hired by Paul Morphos of PJM. PJM was
10 hired by STV to produce both *Music and Passion* and *Songs from the*
11 *Seventies*. The deal memo between STV and PJM is dated November
12 30, 2005, and was signed by Queen on behalf of Stiletto Television and
13 Morphos on behalf of PJM. The deal memo states that “STV shall be
14 said owner of the above-mentioned Program.” SGIMF, ¶¶ 58, 164, and
15 166. Morphos produced at his deposition a “more or less final version”
16 of the production agreement that was “certainly very close to a final
17 version.” SGIMF, ¶ 35. This production agreement contains an
18 assignment clause that calls for PJM and “each and every person
19 engaged by [PJM]” to assign “all right, title, and interest in” *Music and*
20 *Passion* to STV. SGIMF, ¶ 36. At his deposition, Morphos confirmed
21 that this agreement was finalized and signed. SGIMF, ¶ 35. Morphos
22 also testified that he entered into an agreement with Mallet. SGIMF,
23 ¶ 35, 36, and 57.

24 STV and PJM had a similar arrangement for *Songs from the*
25 *Seventies*. STV commissioned Paul Morphos’s work directly as a work

26 _____
27 ⁶ Defendant acknowledges that, at the very least, Mallet is a “possible
28 co-author.” (Motion, at 20)

1 for hire in the context of a motion picture. *Commun. for Creative Non-*
 2 *Violence v. Reid*, 490 U.S. 730, 738 (U.S. 1989) (A work for hire
 3 agreement exists where a work is specially ordered or commissioned for
 4 use as a contribution to a collective work, as a part of a motion picture.).

5 Defendants argument that STV's production agreement with PJM
 6 fails for lack of consideration is unavailing. The production agreement
 7 is clearly supported by the consideration of payment. HCT's claim that
 8 STV did not pay is tantamount to claim for breach of contract, not lack
 9 of consideration. However, HCT, as a third party with no connection to
 10 the STV – PJM agreement, has no standing to assert breach. For *Music*
 11 *and Passion*, STV paid \$248,180.71 directly and Mr. Kief (as part owner
 12 and financier of STV) chose to pay the rest directly on STV's behalf,
 13 without any written agreement obliging STV to surrender its rights
 14 under the PJM agreement. SGIMF, ¶ 31. For *Songs from the Seventies*,
 15 STV commissioned Mallet's work and paid his fees directly, like with
 16 PJM. SGIFM, ¶ 91. There is no legal basis for HCT to challenge the
 17 sufficiency of those payments to PJM now.

18 **IV. Conclusion**

19 Accordingly, and for all the foregoing reasons, Plaintiff
 20 respectfully requests that the Court deny Defendant's Motion for
 21 Summary Judgment in its entirety.

1
2 Dated: April 22, 2019

Respectfully submitted,

3
4 **Pierce Bainbridge Beck Price &**
5 **Hecht LLP**

6
7 By: /s/John M. Pierce

8 John M. Pierce

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